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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11 PHILLIP IRA SCHEFFLIN,  
12                   Petitioner,  
13                  v.  
14 RICHARD MORGAN,  
15                  Respondent.

Case No. C05-5696FDB

REPORT AND  
RECOMMENDATION

Noted for April 21, 2006

16 Petitioner is a state prisoner currently incarcerated at the Stafford Creek Corrections Center  
17 pursuant to a judgment and sentence of the Thurston County Superior Court. Mr. Schefflin seeks federal  
18 habeas relief under 28 U.S.C. § 2254 challenging the 2003 Thurston County conviction. After a careful  
19 review of the record, the undersigned submits the following report and recommends that the Court deny  
20 the petition for writ of habeas corpus as untimely.

21                   DISCUSSION

22                   A one-year period of limitation applies to federal petitions for writ of habeas corpus. The relevant  
23 statute states:

24                   (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas  
25 corpus by a person in custody pursuant to the judgment of a State court. The limitation  
period shall run from the latest of --

26                   (A) the date on which the judgment became final by conclusion of direct  
27 review or the expiration of the time for seeking such review;

28                   (B) the date on which the impediment to filing an application created by  
State action in violation of the Constitution or laws of the United States is

1 removed, if the applicant was prevented from filing by such State action;

2 (C) the date on which the constitutional right asserted was initially  
 3 recognized by the Supreme Court, if the right has been newly recognized by  
 4 the Supreme Court and made retroactively applicable to cases on collateral  
 5 review; or

6 (D) the date on which the factual predicate of the claim or claims presented  
 7 could have been discovered through the exercise of due diligence.

8 (2) The time during which a properly filed application for State post-conviction or  
 9 other collateral review with respect to the pertinent judgment or claim is pending shall not  
 10 be counted toward any period of limitation under this subsection.

11 28 U.S.C. § 2244(d). The one year period of limitation is subject to equitable tolling, thus, the period may  
 12 be equitably tolled by the court “if ‘extraordinary circumstances’ beyond a prisoner’s control make it  
 13 impossible to file a petition on time.” Calderon v. U.S. District Court for Central District of California,  
 14 128 F.3d 1283, 1288 (9th Cir. 1997), *citing Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9<sup>th</sup> Cir.  
 15 1997). The Ninth Circuit commented, “We have no doubt that district judges will take seriously  
 16 Congress’s desire to accelerate the federal habeas process, and will only authorize extensions when this  
 17 high hurdle is surmounted.” Id. at 1289.

18 Here, petitioner was convicted and sentenced by the state trial court on July 29, 2003. Mr.  
 19 Schefflin did not directly appeal his conviction. Rather, he filed a personal restraint petition in the  
 20 Washington Court of Appeals on August 16, 2004, more than one year following the date of his  
 21 conviction. The Washington Court of Appeals dismissed the Personal Restraint Petition on procedural  
 22 grounds, holding that Mr. Schefflin did not file it within the state’s applicable one-year statute of  
 23 limitations for personal restraint petitions. Mr. Schefflin challenged the court’s ruling, by filing a motion  
 24 for discretionary review by the Washington Supreme Court. On February 18, 2005, the Washington  
 25 Supreme Court affirmed the decision and thus, denied review based on statute of limitations grounds. The  
 26 Washington Court of Appeals issued a certificate of finality on May 17, 2005.

27 Here, Mr. Schefflin’s petition should be denied because he has failed to file the matter in a timely  
 28 manner. Under 28 U.S.C. § 2244(d)(1)(A), “[t]he limitation period shall run from . . . the date on which  
 the judgment became final by the conclusion of direct review or the expiration of the time for seeking such  
 review . . .” Additionally, “[t]he time during which a properly filed application for State post-conviction  
 or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted

1 toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

2 Here, Petitioner filed his habeas corpus petition a year and two months after the federal statute of  
 3 limitations period had expired. Petitioner did not seek direct review, and his conviction became final for  
 4 federal habeas purposes on August 29, 2003, which accounts for a 30 day period petitioner could have  
 5 pursued direct review. Washington Rules of Appellate Procedure 5.2(a) (The time for seeking review in  
 6 the Washington Court of Appeals began to run on July 30, 2003). The 28 U.S.C. § 2244(d)(1) one-year  
 7 statute of limitations began to run the next day, on August 30, 2003. It expired on August 30, 2004.  
 8 Mr. Schefflin filed his federal habeas corpus petition on October 17, 2005.

9 As noted above, Mr. Schefflin filed an untimely personal restraint petition with the Washington  
 10 Court of Appeals on August 16, 2004, and spent time seeking review of this petition until approximately  
 11 February 18, 2005, when the Washington Supreme Court affirmed the decision and thus, denied review  
 12 based on statute of limitations grounds. The time sought pursuing this remedy should not toll the running  
 13 of the statute of limitations, since the personal restraint petition was not “properly filed”, as required. *See*  
 14 Pace v. DiGuglielmo, \_\_\_\_ U.S. \_\_\_, 125 S. Ct. 1807, 1810 (2005) (holding that untimely state court  
 15 petition for post-sentence relief did not toll federal statute of limitations because petition did not constitute  
 16 “properly filed” petition).

#### CONCLUSION

17 Petitioner did not timely filed the instant petition for writ of habeas corpus. Accordingly, the Court  
 18 should deny the petition for writ of habeas corpus. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of  
 19 the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file  
 20 written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those  
 21 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit  
 22 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **April 21, 2006**, as noted  
 23 in the caption.

24 DATED this 29th day of March, 2006.  
 25

26 /s/ J. Kelley Arnold  
 27 J. Kelley Arnold  
 United States Magistrate Judge  
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